IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4495 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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MOHD. ZUBAI @ JOHAR ABDUL RAHIM SHAIKH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4495 of 2002

MR EE SAIYED for Petitioner No. 1

Mr. HH Patel AGP for Respondent No. 1-3

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 06/08/2002

ORAL JUDGEMENT

#. By this petition the petitioner has challenged the legality and validity of the order of detention dated 29.10.2001 passed by the Police Commissioner, Surat City, Surat executed on 8.4.2002 being illegal,

unconstitutional and violation of Articles 14,21, 22(5) of the Constitution of India invoking jurisdiction of this Court under Article 226 of the Constitution of India.

#. Heard Mr. E.E.Saiyed learned advocate for the petitioner and Mr. H.H.Patel learned AGP on behalf of the respondents.

#. The petitioner has been served with the grounds of detention along with the bunch of papers referred to and relied upon by the detaining authority while passing the order of detention. On perusal of the grounds of detention and the relevant records available with the court, it is clear that the petitioner has been as being a dangerous person within the meaning of section 2(c) of the Gujarat Prevention of Anti Social Activities Act 1985 (hereinafter referred to as the PASA Act) in exercise of the powers vested with the detaining authority under section 3(2) of the said Act.

#. The detaining authority has mainly considered registration of 3 different criminal offences with Umra and Bardoli Police Stations of Surat district. Umra police station is coming within the territory of Surat Police Commissionerate. The table of cases supplied to the detenu indicates that he was found involved in the offence punishable under sections 307 and 120-B of the IPC and section 25(1)-A of the Arms Act which occurred on 5.1.2001. The second offence was registered on 12.2.2001 for the offence punishable under sections 384,506(2) and 114 of the IPC. The third offence registered with Bardoli Police Station is also punishable under sections 384,387, 506(2) of IPC. The date of arrest of the petitioner in all these 3 cases are relevant . For the first offence he was arrested on 5.5.2001. For the second offence he was arrested on 28.8.2001 and for the third offence registered with Bardoli Police station he was arrested on 27.8.2001. In none of these 3 offences, the petitioner is named as an accused in the FIR registered with the police. The FIR by Bardoli Police Station indicates that the alleged offence was committed at any time between November 2000 to April 2001. In the FIR of second offence registered with Umra Police Station indicates that the alleged offence was committed on 12.2.002 but the FIR was lodged on 30.6.2000. So the two subsequent offences considered by the detaining authority are the cases where the FIR has been registered at a belated stage. Even then, the name of the petitioner is not reflected. Pointing out may such facts Mr. Saiyed learned counsel for the petitioner has submitted that

this is a case of victimisation and colourable exercise of power. The purpose of passing the order of detention is not really reflected in the grounds of detention served to the detenu. The legal malafides can be established from the facts. The petitioner has been victimised by the detaining authority and sponsoring machinery.

#. During the course of oral submissions, in response to a query raised by the court, learned counsel for the petitioner has tendered a copy of the Special Criminal Application No. 554 of 2001 preferred by two petitioners . Present petitioner-detenu is one of them. Said petition was filed on 20.7.2001. The averments made in the Special Criminal Application and the copy of the representation are very relevant because it is the say of the petitioner that two officers named in the said Special Criminal Application No. 554 of 2001 were and are after him and therefore only he was constrained to approach this High Court praying for appropriate writ, direction or order. It is contended that the Umra Police Station authorities are acting under full colour of revenge as serious allegations were made by the petitioner in the above referred Special Criminal Application. A copy of the order passed by this court is also produced.

#. Though the legality and validity of the order of detention has been challenged on number of grounds, Mr. Saiyed has concentrated his arguments mainly on the ground that in view of the above stated facts the impugned order should be quashed and set aside because the same has been passed with malice and in colourable exercise of power and with ulterior motive. The sponsoring authority has misled the detaining authority after obviously implicating him in two different serious offences. He was shown as an absconder only with a view to prejudice this court or any adjudicatory machinery. The other point argued by Mr. Saiyed is that for the sake of arguments if it is accepted that the petitioner was involved in the first offence registered with Umra police station in the month of January, even then, his alleged act cannot be said to be prejudicial to the maintenance of public order and for such solitary incident the petitioner could not have been detained as a dangerous person. From the date of his arrest for the first offence i.e. 25.5.2001, the detaining authority could have exercised jurisdiction immediately with a view to achieve the basic purpose flowing from the law of preventive detention.

#. On careful consideration of the submissions advanced by Mr. Saiyed and the documents available , the court finds some force in the submissions advanced. During the course of submissions Mr. Saiyed has tried to point out that in reality the petitioner was not at all absconding and with a view to brand the petitioner as an absconder some formality has been observed by the police officers of Umra Police Station and the authority. According to him for the sake of argument it is accepted that the petitioner was not available the order of detention could not be executed for a long period, would not by itself validate the order under challenge. When the order of detention, if found illegal, the detention should go.

#. Special Criminal Application mentioned above clearly indicates that the petitioner was arrested with other accused in connection with the first offence registered with Umra Police Station for the first time on 25.5.2001 though he has not been named in the FIR and the police machinery confining both the petitioners illegally till 6.6.2001. Thereafter only the petitioners were released on bail . As per the order of bail the petitioner was obliged to get his presence marked on every first and 15th day of each British Calendar month. Even then the present petitioner and the co-accused were called by Umra Police on 30.6.2001 and put in custody illegally till 4.7.2001 and they were subjected to number of threats and they were also tortured mentally and physically and one of the police officers i.e. respondent no.3 of Special Criminal Application had put his revolver on the head of the present petitioner. Considering the danger and scope of elimination under a fake encounter, the above referred Special Criminal Application was moved for appropriate reliefs and this court passed an order on 23.7.2001 while disposing of the said Special Criminal Application. The relevant part of the order reads as under:

" Considering the submission of learned advocate Mr. E.E.Saiyed so also considering the grievance which has been pointed out by the petitioners, this court is of the opinion that for the grievance pointed out in the petition, the petitioner can approach the higher authorities or can file necessary complaint against the policy authority before the Magistrate. However, direct petition on this count cannot be sustainable before this court especially in view of the decision of the Apex court reported in 1976 (11) SCC p. 582. Therefore, this petition is not maintainable. However, it is open for the petitioners to approach either the higher

authorities or the concerned Magistrate for the grievance which has been pointed out in the present petition. In view of the above observations and directions, present petition is dismissed accordingly. Direct Service is permitted."

#. It is on record that immediately after this order, both the petitioners had approached the Police Commissioner expressing their grievances on 30.7.2001. It is submitted that but for the Special Criminal Application filed by the present petitioners and the complaint made to the Police Commissioner as per the observations and directions of the court, the Umra Police in connivance with the Bardoli Police involved present petitioner in two other criminal cases registered earlier i.e. in the month of June 2001 and July 2001 though the petitioner has not been named in any of its two FIRs. The petitioner has been shown as arrested on 2 different dates as mentioned earlier. Mr. Saiyed has rightly posed a question that whether the detaining authority was supposed to scrutinise this matter while recording subjective satisfaction especially when the date of arrest of the petitioner is subsequent to the date of filing of the writ petition and the complaint made before the Police Commissioner. At least after the receipt of the written representation dated 22.4.2002 the detaining authority after scrutinising the facts in details could have recommended for revocation of the order passed. If that is so, even the State Government could have revoked the order of detention.

##. In the reply affidavit filed it is contended that the detaining authority has not received any representation allegedly made on 22.4.2002 as the petitioner has not produced any acknowledgment receipt of the representation. But during the course of oral submissions in reply to a query raised by the court Mr. Saiyed has tendered under certificate of posting dated 23.4.2002 and the date is eligible from the postal stamp affixed by the post office located in the High Court premises, Ahmedabad. The court has no reason to disbelieve the say of the learned counsel that this under certificate of posting has been prepared by him in his handwriting and he had personally despatched the representation to both the authorities mentioned therein. This representation might have been reached under any incidental circumstances. But in view of the certificate of posting it can reasonably be inferred that the same was discharged to the competent authorities including the Secretary to Home Department, Sachivalaya, Gandhinagar.

Nobody found that the State Government has filed any reply till today. With this factual contingency the court can say that the powers of revocation of the order of detention which could have been exercised by the State Government, has not been exercised nor the detenu has been informed by the State Government as to what happened to his representation despatched through his counsel on 22/23/4/2002.

##. The subjective satisfaction for branding the present petitioner as dangerous person is also under a big question mark. The statements of two unnamed witnesses recorded by the sponsoring authority i.e. PSI Umra Police Station, Surat City have been considered by the detaining authority. Both the statements are dated 10.10.2001. The first witness has narrated an incident allegedly occurred five months prior to the date of recording of his statement. The date of arrest of the present petitioner in the first offence becomes relevant. He has been shown as arrested on 25.5.2001. Though the petitioner was arrested on 25.5.2001 what prevented this witness in approaching the police immediately after his arrest especially when he was under police remand. It seems that the vagueness as to the date and time of the incident and other contents does not inspire confidence. Surprisingly this statement was not placed before the detaining authority for 15 days i.e. till 25.10.2001. The same is the situation qua the second witness. Of course he has given a specific date while describing the alleged incident. The petitioner though was arrested in the month of August 2001 for 2 serious offences and was under police remand, this witness has also not cared to approach Umra Police till 10.10.2001 for the alleged incident dated 9.9.2001. The modus operandi of the petitioner is reflected from the 3 different FIRs registered and the alleged behavior with this two secret witnesses is also not found consistent. Before recording subjective satisfaction the detaining authority is supposed to consider the apparent facts or relevance emerging from the papers placed before him. The order of the High Court was placed before the very officer while making complaint against the police officials of Umra Police Station. So without dealing with all these relevant and material aspects the detaining authority has accepted the say placed by the Umra Police Station mechanically without application of mind. For all the 3 offences registered against the petitioner the competent court has granted bail. Considering the totality emerging from the police papers it is rightly submitted that it is not difficult to implicate a person into a crime by finding out some FIRs wherein the complainant

has not named all the accused persons or number of accused are comparatively more and some of them are remained to be arrested. For the sake of argument it is accepted that the petitioner might have been involved in all these 3 offences, but when the sponsoring machinery had not initiated any proceedings to put up a case even under PASA till the date of writ petition filed before this court or atleast the day on which the complaint was made before the Police Commissioner in compliance of the order passed by this court then , such initiation of proceedings should be viewed very seriously and the order of detention passed with this back ground cannot be held either legally valid or proper. Placement of wrong cause before the authority would make the order itself bad and an order passed in full of colour of revenge.

##. The date of arrest in 3 offences registered with Bardoli Police Station if considered, as per the settled legal proposition, then the date of recording of statements of 2 un-named witnesses is not in the proximity. Further the date of verification of the statement of 2 un-named witnesses, has been made at a belated stage and the order of detention has been passed on 29.10.2001. So the time gap between the date of arrest in the third offence and the order of detention, is more than two months. This delay in passing of the order of detention should have been explained reasonably. It is true that the delay in passing the order of detention is not always fatal. But whether any delay should be treated as fatal or not depends on set of facts of each case. In the light of the above discussion of facts the court finds that this delay should be treated as fatal in the present case. So in the present case order of detention suffers from more than one infirmities and therefore, obviously it cannot be sustained.

##. Of course Mr. H.H.Patel learned AGP has strongly resisted this petition and has submitted that the petitioner being a head strong man having influence in the area could not be arrested in the first offence for a long period and was able to remain underground from 29.10.2001 till 8.4.2002. This aspect itself is sufficient in accepting the say of the detaining authority that the petitioner is a dangerous person. At this stage it is relevant to note that the detaining authority had published a Notification/order in exercise of powers vested by section 82 of Cr.P.C. on 8.4.2002 itself and on that very day the petitioner was arrested by Umra Police any time around noon- it may be 11.30 a.m. or 12.00 noon. The calendar shows that it was a Monday. It is possible that the detaining authority might have

sent the Notification in time prior to the time of arrest in the early hours of office working. It is on record that Umra Police Officials had contacted the concerned Dy.Commissioner of Police etc. immediately after the arrest of the present petitioner on 8,4,2002. On that day prior to 18.00 hours the petitioner was already sent with police force to Junagadh as he was to be kept in custody in the Prison at Junagadh. The office hours are from 10.30 a.m, to 6,10 pm,. It is equally possible that the Order/Notification under section 82 of the Cr.P.C. might have been passed at any time after the arrest of the present petitioner. So it would be risky to accept the say of the learned AGP that even the declaration of the petitioner as an absconder should be given proper weightage in appreciating the totality of the present case.

##. In support of his submission Mr. Patel Learned AGP has relied upon a decision in the case of Premsing @ Pally Jesing Rajput reported in 1999(1) GLH 648. In my view this decision would not help the respondent State. In the cited decision the learned Judge has held that when the passing of an order is under scrutiny, then the delay has to be computed from the date of commission of last unregistered offence. But in view of the above discussed facts in this sited decision, the incident narrated by one of the witnesses has allegedly occurred on 15.5.1998 and after completing the formalities the order of detention was passed on 16.6.1998 i.e. within a period of around 30 days. There is no reference as to when the witness had disclosed this alleged unregistered offence before the sponsoring agency and the time taken by the sponsoring authority in placing the papers before the detaining authority for recording verification of the statement and the time gap between the date of recording of the statement and the order of detention. So this decision would not help the respondent State. The second decision relied upon by the learned AGP is in the case of Dipakbhai Maganbhai Sosa vs. Commissioner of Police, Surat City & ors. reported in 1999(2) GLR 1527 . This decision deals with the fact where it was contended that the order of detention is passed mechanically because it suffers from the vice of non application of mind. The detaining authority had not disclosed that under what Chapter the offence was committed by the petitioner were punishable either under Chapters 16 or 17. The say of the present petitioner does not stand on this totally technical plea. So this decision also would not help the respondent State. The third decision relied upon by the learned AGP is in the case of Kanuji S.Zala vs. State of Gujarat reported in 1999(2) GLH 415. In this case the

court was dealing with the case of a bootlegger and the court held that when the detaining authority has specifically stated in the grounds for detention that selling of liquor by the petitioner and its consumption by the people of the locality was harmful to their health, is sufficient to pass an order of detention. According to the learned Judge what is required to be considered in such cases is whether there was any credible material before the detaining authority on the basis of which a reasonable inference could have been drawn as regards the adverse effect on the maintenance of public order as defined in the Act. So according to Mr Patel the activity of the present petitioner was so dangerous that it was not possible for the police to arrest him for several days after the commission of offences, the court should hold that there is no infirmity in recording subjective satisfaction. But as in the present case the detaining authority has not cared to apply his mind in view of the facts emerging from the record and other facts available to him and there is an element of vagueness in the statement recorded by 2 witnesses. Therefore, it would be difficult to hold that there was any credible material available with the detaining authority on the day on which the order of detention has been passed. So this decision also would not help the respondents.

##. For short the order of detention under challenge suffers from infirmity and the same is passed in violation of the Constitutional guarantee enshrined flowing from Article 22(5) of the Constitution of India. The detaining authority with the above set of facts had no reason to exercise powers vested under section 3 of the PASA Act. So the order of detention and continued detention both shall have to be turned down.

##. For the reasons aforesaid, this petition is allowed. The impugned order of detention dated 29.10.2001 passed by the Police Commissioner, Surat City against the petitioner detenu is hereby quashed and set aside. The petitioner detenu Mahmad Zuber alias Johar Abdul Rahim Shaikh is ordered to be set at liberty forthwith if he is not required to be detained in any other cases. Rule is made absolute. Direct Service.

(C.K.Buch-J)

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